BRIEF IN SUPPORT OF PETITION.

POINT I.

The issue awaiting this Court's solution is of public importance.

Shall a surety company which derives a profit from the bonding of a municipality's obligations be permitted to repudiate its bond on the ground that the provisions of a local State statute of limitations have not been complied with when the bonded obligations of its principal have acquired national scope and character, because the municipality has obtained for the project in which the obligations were incurred the financial assistance of the National Government, and because the municipality has sought and obtained for that public project the material resources of national private enterprise?

The decision of this Court in the *Southeastern Underwriters Association* case (reported in the press of June 6, 1944), constitutes a further ground for the granting of this petition.

A.

The bond itself (Record page 60, Appendix E) runs (a) to the Knoxville Electric Power and Water Board, Knoxville, Tennessee; (b) to the United States of America; and (c) to all persons and corporations who may furnish materials "for or perform labor on a Rural Electrification Administration Project known as Project REA, Tenn. 0030 A1-B1 Knoxville Public—PWA Docket Tenn. 3289 P * * *".

As the record shows, therefore, the City of Knoxville stepped over State lines—*first*, to request and obtain financial support for its project from the Federal Government—

next, to enlist the aid of national industry and to avail itself of the productive resources of the nation.

Not content with State facilities, the City sought the best and widest market to supply its needs.

Its obligations, therefore, which the respondent bonded, were nationwide. They ran to all its invitees, who dealt upon the faith of its appeal for aid.

Are the local statutory limitations of the State of Tennessee not referred to in any way in the bond in suit to be availed of by the City's bondsman as a trap for national business? Are not those who deal with a public institution embarked upon a public project entitled to expect and to receive something above the morals of the market place? By resorting to hindsight respondent has been enabled to crawl out of a contractual obligation bought and paid for by petitioner.

This respondent's bond ran to the United States Government. Would this Court have permitted, for example, the national credit to be jeopardized by failure to comply with the requirement of a State statute (had there been such) compelling the United States Government to file a ninety-day notice and bring a suit in the Courts of the State at the risk, otherwise, of nullifying millions of dollars worth of Government loans? Why should a different treatment be accorded the national Government than that accorded the national business enterprise which made the project possible?

Is it not clear, also, that important governmental policies and projects will in turn suffer from the curtailing effects upon the credit of municipalities which the chaotic application of such drastically short local statutes of limitations cannot fail to produce?

In a case decided in Tennessee after the *Burgess* case, but before the instant case, *Ben M. Hogan* v. *Walsh & Wells*

Inc. et al. (177 S. W. (2d) 835, Feb. 5, 1943, opinion attached hereto as Appendix F), the highest Court of Tennessee, itself, adopts views at variance with its decision in the *Burgess* case and which, if anything, favor the petitioner's contentions. Petitioner all along has contended that the terms of the bond in suit were much broader than the minimum requirement of the Tennessee statute, that it gave materialmen and laborers their full statutory protection and much more. The same was true in the *Walsh & Wells* case, except in the bond furnished in that case reference was made to the statute. In our case, while no mention was made of any statutory provision, the bond expressly granted to the obligees the clear right to "sue hereon." Speaking of the Walsh & Wells bond the Supreme Court of Tennessee said (177 S. W. (2d) 835, 836):

> "Here the language of the bond is broader and more comprehensive and exceeds the provisions of the statutes and refers to the statutes, '*and also independently of said statutes*'. The Court of Appeals (*intermediate Tenn. Appellate Court*) held that the words 'and also independently of said statutes' must be given some meaning and were no doubt added for the protection of those persons who might furnish labor and materials on said contract but who for some reason might not be entitled to recover by virtue of the statutes, and that this provision was inserted in the bond in accordance with the policy of the Federal Emergency Administration to furnish employment to a large class of people who were unemployed in a time of widespread depression and naturally to see that they were paid their just claims, notwithstanding their failure to meet the requirements of the statutes." (Emphasis supplied.)

Petitioner calls the Court's attention to the wording of the bond here in suit quoted in part page 2 of this Brief.

It gives materialmen and laborers the absolute right to *sue on the bond* in their own names. Surely this must be given some meaning too, and what could be more logical than bringing on action "independently" of said statute and this is precisely what petitioner did do.

B.

Still another ground exists for the granting of this writ.

This Court's decision in the *Southeastern Underwriters Association* case (reported in the press of June 6, 1944), applies with even greater force to the defendant insurance corporation here, and to its insurance contract—the indemnity bond in suit—because that insurance contract was written in and is an integral part of interstate commerce.

It needs no argument to demonstrate that the application to insurance contracts of special short statutes of limitations hidden away in the local statutes of some forty-eight State Legislatures constitutes the most direct fettering of interstate commerce imaginable. It is condemned by the express provisions of the Commerce Clause of the Constitution of the United States.

Within the purview of this Court's opinion in *Edwards v. California*, 314 U. S. 160, it now seems established in the light of the *Southeastern Underwriters Association* decision that insurance, at least of this type, is so clearly interstate commerce that it "does not admit of diverse treatment by the several States" (p. 176).

Where, as here, the insurance contract is so integral a part of interstate commerce, it follows that the attempted restraint of the State statute is not legitimate as merely "incidental" (*Milk Control Board* v. *Eisenberg Co.*, 306 U. S. 346).

In such a case, the fact that Congress may not yet have exerted (by specific legislation) its power under the Com-

merce Clause can make no difference where, as in the case at bar, the "interstate activities" so intimately involve "national interests" and are so obviously of a *non*-local character that they may *not* "appropriately be regulated in the interest of the safety, health and well-being of local communities" (see this Court's opinion, *Parker* v. *Brown*, 317 U. S. 341, pp. 362, 363).

Petitioner respectfully submits that this Court should act now before the States have become so entrenched in the field that Congress may be hampered in enacting proper regulatory legislation.

POINT II.

A real confusion has been produced by these two decisions of the Tennessee Court and by the New York Court's interpretation of the Tennessee Law.

Doubts thus created may have disastrous national consequences unless this Court will entertain the writ and thereby undertake by its decision to harmonize these conflicting holdings and dissipate the business uncertainty which they produce.

A.

Uncertainty Produced by the New York Court's Application of the Tennessee Court's Decision.

Standing by itself, *City of Knoxville* v. *Burgess*, *supra*, decided only:

1. That so far as the bond enured to the benefit of furnishers of labor and material, it was a statutory bond in the sense that it was given in accordance with the requirements of the Tennessee Statute;

2. That when the bond was put in suit in a Tennessee Court, it was subject to the provisions of Sections 7955-7959 of the Tennessee Code; and

3. That, far from creating conditions precedent to the obligation, the provisions of the Tennessee Statute imposed limitations only upon the remedy in the Courts of that State and were susceptible of waiver and estoppel. The Tennessee Court, in fact, remanded the cause for the express purpose of inquiry into these two issues of fact.

The New York Court of Appeals lifts this decision from its context; gives it an extra-territorial application never intended by the Court that rendered it, and then reads into that decision meanings and implications beyond anything that it was either necessary or possible for the Tennessee court to have adjudicated in that action.

B.

Confusion Produced by the Tennessee Court's Later Decision in the Case of *Hogan* v. *Walsh & Wells, Inc.*

This case, by its reference to the previous decision in *City of Knoxville* v. *Burgess*, casts doubt upon the scope and intention of the Tennessee Court's previous decision.

The later decision indicates an uncertainty and ambiguity in the Tennessee Court's interpretation of its own Statute. This later decision, if followed by the New York Court of Appeals, would have resulted in a recognition of the common law aspects of the bond in suit. Consistency in Court decisions is essential—to adopt different standards for similar situations is arbitrary. In the present confused situation, the rights of business interests, dealing in interstate commerce and across State lines, are made to depend either upon the addition or omission from a public projects' bond of a mere phrase or else upon knowledge of local circumstances and requirements which it is grossly unfair and unreasonable to impute to them. The material of this petitioner went into this public project. This

Court has very recently expressed its views with regard the protection of those who put their efforts and materials into public projects. See *Clifford F. MacEvoy etc., Petitioners* vs. *U. S. of A. etc.*, decided April 24, 1944 (..... U. S. ....., 88 L. Ed. 795).

These facts, petitioner submits, involve important public issues and affect nationwide rights and interests in addition to the private rights and interests involved in the present litigation.

To compose these difficulties, therefore, and to restore to the petitioner its personal Constitutional rights, of which the judgment of the Court of Appeals deprives it, it is respectfully submitted that the Court should grant the present application for a writ of certiorari directed to the Court of Appeals and the Supreme Court of the State of New York.

C.

Confusion Produced by Conflict with this Court's own Previous Decisions.

1. In *Mid-State Horticultural Co. Inc.* v. *Pennsylvania Railroad Co.*, 320 U. S. 356 (decided Nov. 22, 1943), this Court again laid down the fundamental principle that a statute which bars only the remedy (unlike one which extinguishes the right) may be waived.

The necessary effect of the Tennessee Court's action in remanding the *Burgess* case, *supra*, is to adjudicate that the statute in question affects only the remedy and is consequently a mere Statute of Limitation. The New York Court's contrary interpretation of these statutes, both ignores the actual holding of the Tennessee Court and conflicts with the principle announced by this Court in the *Mid-State Horticultural* case.

2. The decision of the Court of Appeals of the State of New York further conflicts with the decision of this Court in *International Steel & Iron Co.* v. *National Surety Co.* (1935) 297 U. S. 657. This Court there construed an indentical Tennessee Statute relating to a public contractor's bond given in connection with a project undertaken by the State of Tennessee through its Department of Highways & Public Works. This Court held that this Tennessee Statute created no new contractual right, saying (Opinion, page 664):

> "The Statute itself confers no contractual right, on any subcontractor, nor does it by its own force confer upon him any new remedy * * *."

This Court's decision in that case purports to be founded on a long line of previous decisions of the Tennessee Court, both with respect to the statute there, and the statute here, involved.

All previous decisions of the Tennessee Court have recognized the existence of a right of action at common law on just such a contract as was created by this bond.

> *Ruohs* v. *Trader's Fire Ins. Co.* 111 Tenn. 405; 78 S. W. 85
>
> *Standard Oil Co. of La.* v. *Jamison Bros. Inc.* 166 Tenn. 53; 59 S. W. 2d 522

3. Finally, the erroneous extension to the Tennessee Statute of Limitations of full faith and credit by the New York Court of Appeals conflicts with this Court's previous decision in *Magnolia Petroleum Co.* v. *Hunt* (Oct. Term 1943) 320 U. S. 430. This Court there accurately stated a settled rule of construction of the Full Faith and Credit Clause, saying (at pp. 436, 437):

"In the case of local law, since each of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders, the full faith and credit clause does not ordinarily require it to substitute for its own law the conflicting law of another state, even though that law is of controlling force in the courts of that state with respect to the same persons and events."

D.

Confusion Produced by the Departure of the New York Court of Appeals from its own Previous Decisions.

In *Clark Plastering Company* v. *Seaboard Surety Company*, 259 N. Y. 424, the Court of Appeals of the State of New York announced its construction of just such a statute of the State of New Jersey as affecting the remedy only and not extinguishing the right.

The Court of Appeals proclaimed that (p. 429):

"The cause of action here is upon a contract voluntarily made; it is not unknown to the common law; it is not contrary to our declared policy; and neither liability nor remedy has been supplied by a foreign statute."

Both the petitioner and respondent are, and at all times have been, residents and subject to the jurisdiction of the Courts of the State of New York and have contracted in the light of its decisions and acted upon the faith of the policy therein openly declared. That policy has been (*Sharrow* v. *Inland Lines, Ltd.*, 214 N. Y. 101) to construe such a statute as "a limitation upon the remedy and not upon the right" (p. 110) and (*Gutkind* v. *Lueders & Co.*, 267 N. Y. 320) to refuse to apply a foreign Statute of Limitations

when, as here, it deprives a citizen of the State of New York "of any right or relief" (pp. 331-332).

The Court of Appeals' present reversal of its previous policy impairs the obligation of the contract between the parties to the present litigation and violates petitioner's Constitutional right to due process of law.

POINT III.

The Writ prayed for should be granted.

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Respectfully submitted,

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